Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1451

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA

v.

HOWARD M. LEVY, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Submitted by:

DAVID S. GOLUB
CATHERINE C. ZIEHL
SILVER, GOLUB AND SANDAK
184 Atlantic Street
P.O. Box 389
Stamford, Connecticut 06904
(203) 325-4491

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

I. Whether the definition of materiality in false tax return prosecutions adopted by the United States Court of Appeals for the Second Circuit, which is in conflict with this Court's decision in Kungys v. United States, --- U.S. --- , 99 L. Ed.2d. 839, 108 S. Ct. 1537 (1988), and the holdings of the other circuits, is valid.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988
NO.

UNITED STATES OF AMERICA,

Petitioner,

v.

HOWARD M. LEVY,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR
THE SECOND CIRCUIT

The petitioner Howard M. Levy prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered on September 13, 1988.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit rendered an unpublished opinion which is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 9, 1988, and petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 1, 1988. (A copy of the order denying said petition is attached as Appendix B.)

Petitioner files this Petition out of time and respectfully requests that the time for such filing be extended and that the Court waive the sixty-day filing period. In support of this request, petitioner's counsel represents that petitioner expressly requested him and he expressly

agreed to file a timely petition. Due to an inadvertent calendaring error, the matter was not properly docketed on counsel's schedule. Because counsel was involved in a complex trial from early December, 1988 through February 8, 1989, the matter did not come to his attention, and this petition was mistakenly not filed in a timely manner as counsel had agreed to do.

Petitioner's counsel asserts that there exists a good faith, meritorious issue on appeal in that the Court of Appeals' decision is in conflict with other circuits and with a United States Supreme Court decision. Petitioner should not be penalized due to counsel's error and therefore requests permission to file his petition out of time.

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 7206(1) of the United States Code provides, in pertinent part, as follows:

> (1) "any person who ...willfully, makes and subscribes any return ... which contains a written declaration that it is made under penalties of perjury and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony."

STATEMENT OF THE CASE

Petitioner Levy was convicted after a jury trial in the United States District Court for the District of Connecticut of two counts of filing false tax returns, 26 U.S.C. §7206(1), one count of conspiracy to defraud the United States, 18 U.S.C. §371, and 37 counts of aiding in the preparation of false tax returns, 26 U.S.C. §7206(2).

Petitioner received three consecutive two year sentences on the convictions under §7206(1) and §371, respectively, and concurrent suspended terms on the conviction under §7206(2). Additionally, petitioner Levy was placed on five years of probation, consecutive, and was fined. Petitioner had no prior criminal record.

At issue in this petition are petitioner's convictions under §7206(1) for filing false tax returns, for which he is serving four years of his six-year sentence. In particular, at issue is whether, as applied by the courts below, the Government's theory of "materiality" -- an essential element of the offenses -- is erroneous as a matter of law. Petitioner submits that the theory of indirect materiality urged by the government and adopted by the Court of Appeals in this case is in conflict with the definition of materiality adopted by other circuits and by

this Court in Kungys v. United States, --- U.S. --- , 99 L. Ed.2d 839, 108 S. Ct. 1537 (1988).

The false statements at issue were contained in a corporate balance sheet submitted with corporate returns of Midland Alcohol Fuels, Inc. ["Midland"], a corporation of which petitioner Levy was an officer. The false statements involved an unspecified debt and offsetting asset reported on the Midland balance sheets. The Government at no time claimed that the false statements on the returns had any bearing on the calculations of Midland's income, expenses or tax liability. In fact, Midland claimed no income or expenses associated with the claimed debt and claimed asset. Moreover, the Government did not assert that Midland's statement of the debt or asset on its balance sheets could in any way affect the IRS's efforts to verify the accuracy of

Midland's report of its income, expenses or tax liability. As the investigative Internal Revenue Service agent expressly conceded at trial, the misstatements were irrelevant to any attempt by the Internal Revenue Service to audit or verify Midland's returns. [A 261-62].*

It was the Government's position below, that a false statement could be material pursuant to §7206(1) even if it did not relate to the return in question as long as it could hinder IRS verification of the accuracy of another taxpayer's return.

Relying on this theory, the Government contended that Midland's misstatement on its balance sheets of an unspecified asset and an unspecified note had the potential to obstruct the IRS investigation of the tax liability of another taxpayer, Clinton Energy Associates, a separate partnership.

---

*The symbol "[A]" denotes reference to the joint appendix on appeal to the Second Circuit Court of Appeals.

The Government claimed that Midland's misstatements could deceive the IRS in its investigation of Clinton by confirming Clinton's claim that it had borrowed money from Midland to purchase equipment.

The Government argued that its investigation of Clinton was potentially hampered by the absence of an inconsistency on Midland's returns with the statements about the note on Clinton's returns. The Government argued that even though the deductions and credits on Clinton's returns subsequently challenged by the IRS did not flow directly from the promissory note, had the IRS been aware that Midland did not report the same note that Clinton reported, an investigation could have resulted uncovering false tax credits and depreciation deductions by Clinton.

This theory of materiality was first fashioned by the Second Circuit in United

States v. Greenberg, 735 F.2d 29 (2d Cir. 1984) and endorsed on appeal in this case. It has never been applied by any other Court of Appeals and is in direct conflict with this Court's recent holding in Kungys v. United States, --- U.S. --- , 99 L. Ed.2d. 839, 108 S. Ct. 1537 (1988).

Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 1, 1988.

REASON FOR GRANTING THE WRIT

A. THE TEST FOR MATERIALITY ADOPTED BY THE COURT OF APPEALS IS IN CONFLICT WITH THE OTHER CIRCUITS AND IS IN CONFLICT WITH THIS COURT'S DECISION IN KUNGYS V. UNITED STATES.

The Second Circuit stands alone in adopting a theory of materiality that permits a jury to convict on the basis of false statements which are material to a return other than the one that is the subject of a potential investigation.

The decision in this case and in United States v. Greenberg, supra, established an expansive definition of materiality that was wrong at the time of its inception and continues to be wrong in the aftermath of Kungys. Petitioner has found no cases, either before or after Kungys was decided, in which any other Court of Appeals has followed that part of Greenberg that expanded the concept of materiality to include the hindering of the verification of a return other than the one at issue. See e.g., United States v. Warden, 545 F.2d 32, 37 (7th Cir. 1976) (test of materiality is whether a particular item must be reported in order that taxpayers estimated tax correctly); United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969).

Significantly, Greenberg cited no authority for this proposition and is, in

fact, in conflict with its own prior description of the scope of the materiality element under another federal statute. See, United States v. Berardi, 629 F.2d 723, 730 (2d Cir.), cert. denied, 449 U.S. 995 (1980) (false statement before a grand jury must be related to the specific grand jury inquiry).

In any event, Greenberg does not survive the decision in Kungys. In Kungys, this Court observed that the concept of "materiality" inherent to the numerous federal statutes prohibiting false statements to public bodies has been subject to a uniform understanding in the federal courts. Kungys v. United States, supra at 852. "The most common formulation of that understanding is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the

decision-making body to which it was addressed." Id. A misrepresentation is, thus, material if it is "predictably capable of affecting" the official decision or inquiry. Id. at 853.

In this case, the relevant official inquiry involved Midland's tax liability. It was undisputed, however, that the false statements on the returns had absolutely no bearing on the calculation of Midland's income, expenses or tax liability. Nor did the Government offer evidence or even assert at trial that the false statements on the Midland's returns could in any way affect the IRS's efforts to verify the accuracy of Midland's income, expenses or tax liability.

Nevertheless, the Court of Appeals held that the statement could be material if it hindered verification of another taxpayer's return -- the Clinton return. The Government's theory was that if the false

statement did not appear on the Midland return, an inconsistency would exist with the Clinton return which reported the note, leading to an investigation.

Kungys, however, makes clear that this rationale for holding the statements material under Greenberg is invalid. In Kungys, an applicant for citizenship misstated his place and date of birth on his naturalization petition, repeating misstatements previously made in his application for a visa. The Government contended that had a true statement of the place and date of birth been set forth in the petition, immigration officials would have noted the inconsistency with the information in the earlier visa application and instituted an investigation uncovering the applicant's Nazi past. This Court rejected the claim that a misrepresentation is material if a true statement of the facts

would result in official knowledge of an inconsistency with other untrue statements. As Justice Scalia's plurality opinion[1] held "[w]hat must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation." Id. at 856.

The holding in Kungys is directly applicable here. It invalidates the holding in United States v. Greenberg relied upon by the Court of Appeals in upholding petitioner's §7206(1) convictions. Petitioner respectfully submits that the decision below was erroneous and should be reviewed and reversed.

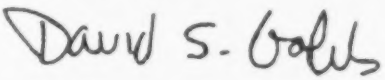
---

[1] Six of the eight participating Justices joined in this portion of the plurality opinion.

IV. CONCLUSION

For the foregoing reasons, Petitioner prays that his Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



DAVID S. GOLUB
CATHERINE C. ZIEHL
SILVER GOLUB & SANDAK
184 ATLANTIC STREET
P.O. BOX 389
STAMFORD, CT 06904
(203) 325-4491

Attorneys for Petitioner
Howard M. Levy

APPENDIX A:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the thirteenth day of September, one thousand nine hundred and eighty-eight.
PRESENT:

HON. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY,
Circuit Judges

HON. EDWARD R. KORMAN
District Judge.*

- X
UNITED STATES OF AMERICA,
Appellee,

-v.-

HOWARD M. LEVY,

Defendant-Appellant.

- X

Appeal from the United States District Court for the District of Connecticut (Cabranes, J.).

---

*Hon. Edward R. Korman, District Judge, United States District Court for the Eastern District of New York, sitting by designation.

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

IN CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court is AFFIRMED.

Howard M. Levy appeals from a judgment of conviction entered in the United States District Court for the District of Connecticut following a jury verdict finding him guilty of conspiracy to defraud the United States, filing false tax returns, and aiding in the filing of false tax returns in violation of 18 U.S.C. §371, and 26 U.S. C. §§ 7206(1) and (2), respectively.

Defendant contends on this appeal that the district court exceeded proper bounds when questioning a witness, erred by omitting an instruction on the requirement of actual falsity under 18 U.S.C. §7206(1), and erred in finding that false statements on tax forms signed by him were material within the meaning of 18 U.S.C. §7206(1). Each of these contentions is without merit.

The witness questioned by the district court, Robert Johnson, had previously pleaded guilty to a charge of conspiring with Levy and others. In response to a question by defense counsel, Johnson denied that he "ever . . . with intent to . . .. violate any criminal law, conspire[d] with . . . Howard Levy . . . to violate any criminal statute of the United States."

A. 114. Sometime later, Judge Cabranes asked Johnson about what he had said regarding Levy during the plea allocution that preceded Johnson's guilty plea. When he asked Johnson whether or not Johnson had stated during the colloquy that Levy was one of his "co-conspirators," all that he elicited was a response from Johnson that the plea agreement "said Howard was involved." A. 229-(9). The defendant's attorney, who voiced no objection to Judge Cabranes' questions, immediately asked Johnson to read the plea agreement and elicited from him the fact that "nowhere, nowhere in the document" did Johnson say "that Howard Levy conspired with [him] or that [he] conspired with Howard Levy to defraud the United States." A. 229-(12).

We do not believe that Judge Cabranes' questioning, to which no objection was voiced, constituted plain error. While Judge Cabranes did not have the plea minutes and was not aware that Johnson was as protective of Levy during those proceedings as he was during the trial, Johnson did not admit to Judge Cabranes that he implicated the defendant during the plea allocution and there was obviously no extrinsic evidence offered to show that he had done so. Moreover, the defendant was free, if he chose, to use the minutes of the plea colloquy, just as he used the plea agreement, to correct any erroneous impression left as a result of Judge Cabranes' questions or Johnson's answers.1 These facts, combined with

the cautionary instructions given by the district judge before and after asking the disputed questions,2 compel the conclusion that, if error was committed, it was not plain error.

The defendant claims that, with respect to Counts Two and Three, Judge Cabranes failed to "instruct the jury that it must also find that the disputed statements in the returns were, in fact, false." Appellant's Brief 32-33. At trial, however, the defense not only failed to object to the charge, but actually submitted its own request to charge that did not include falsity as an element of the offense. See Appellant's Brief 37-38, n.*. But even setting these omissions aside, the characterization of the charge is incorrect.

While it is true that Judge Cabranes did not say in haec verba that falsity was one of the "elements" of the offense of filing a false return, his charge required the jury to find that the statements were false before they could convict. Specifically, after instructing the jury that materiality was an element of the offense that he was to decide, he made it clear that his determination that the statements were material was dependent on a finding by the jury "that the defendant falsely represented" the specific facts alleged to be false in the indictment. Moreover, he continued, "The purpose of Section 7206(1) is to impose penalties for perjury upon those who willfully falsify their returns. . . ." A. 374-75.

Under these circumstances, given the language of Counts Two and Three, which were read to the jury and which charged that figures on the return "were based on sham transaction[s] that had been arranged by Howard M. Levy in order to deceive the Internal Revenue Service, " A. 369-72, we find it inconceivable that the jury would have convicted the defendant unless it found that the statements were false. Accordingly, any error in the wording of the charge was not plain error.

Defendant contends that the inclusion on a tax form of an $8.75 million debt and offsetting asset was non-material because it produced no tax consequences to the firm reporting it. This argument is erroneous. A violation of 26 U.S.C. §7206(1) occurs when a misstatement potentially hinders the

Internal Revenue Service in verifying the accuracy of that return or a related tax return. United States v. Greenberg, 735 F.2d 29, 31 (2d Cir. 1984). We do not view the plurality opinion in Kungys v. United States, ____ U.S. _____. 108 S. Ct. 1537 (1988), which was decided in another context, as undermining the straightforward and clearly applicable rule of United States v. Greenberg.

HON. FRANK X. ALTIMARI,

HON. J. DANIEL MAHONEY,

Circuit Judges

HON. EDWARD R. KORMAN,

District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

FOOTNOTES

1. The plea minutes would normally constitute material to be made available to the defendant under 18 U.S.C. §3500. If for some reason that was not the case here, the defendant had a right to see the plea minutes on request when Judge Cabranes questioned Johnson about them. Fed. R. Evid. 613. No such request was made here.

2. Apparently contemplating putting some questions to Johnson on this issue, Judge Cabranes had previously obtained approval of a proposed cautionary instruction to be used in the event that he decided to pose any questions "in the interest of justice, if, in fact, the Government doesn't cover it or Mr. Keefe doesn't cover it." A. 154-57.

APPENDIX B:

ORDER OF THE SECOND CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 88-1062

United States of America,
Appellee,

versus

Howard M. Levy,
Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, Howard M. Levy.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

_____

CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of November one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,

Appellee,

v.

HOWARD M. LEVY,

Defendant-Appellant.

Docket No. 88-1062

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the Defendant-Appellant HOWARD M. LEVY,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Fred M. Cassidy,
Chief Deputy Clerk

For: Elaine B. Goldsmith
Clerk